Section 3

TRIAL OF CRIMINAL TAX CASE

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I. INDICTMENT AND ARRAIGNMENT.

A. The indictment must be a plain, concise and definite written statement of the essential facts constituting the charge. Fed. R. Crim. P. 7.

B. Prior to indictment, counsel should reach an agreement with the prosecutor for a voluntary surrender to avoid embarrassment and undue hardship to the client.

C. Counsel should also be know if the prosecutor will oppose bail or release on personal recognizance. Arrangements for bail should be made prior to the surrender.

D. If the defendant has travel problems, they should be addressed at the arrangement. Generally, courts will require a motion setting forth the specific travel arrangements before agreeing to travel outside the district.

II. MOTIONS.

A. Local Rules. Be cognizant of all local rules regarding the requirements and time for filing pretrial motions.

B. Motion for Disclosure of Electronic and Mechanical Surveillance.

1. Rule 16(a)(1)(A) of the Rules of Criminal Procedure requires in mandatory terms that the government shall make pretrial disclosure of all recordings of a defendant's voice, superseding any discretionary disclosure provisions of 18 U.S.C. § 2518.

2. In *Alderman v. United States*, 394 U.S. 165 (1969), the Supreme Court established that all electronic surveillance of a defendant must be disclosed in adversary proceedings before its legality, relevancy, or a defendant's standing can be determined by a trial court.

3. Any request or assertion is sufficient to require an affirmative or negative response from the government. *United States v. Tucker*, 526 F.2d 279 (5th Cir. 1976), *cert. denied*, 425 U.S. 958 (1976).

C. Motion for Statements of Alleged Indicted or Unindicted Co-Conspirators.

1. In *United States v. Jackson*, 757 F.2d 1486, 1491 (4th Cir. 1985), *cert. denied*, 474 U.S. 994 (1985), the Court of Appeals held that a "defendant is entitled to disclosure of statements of co-conspirators even if the co-conspirator is not a prospective government witness."

2. Summaries of statements may be discoverable. *United States v. Johnson*, 525 F.2d 999, 1003-1005 (2d Cir. 1975), *cert. denied*, 424 U.S. 920 (1976).

D. Motion for Disclosure of All Evidence the Government Intends to Offer Pursuant to Rule 404(b) of Federal Rules of Evidence.

1. Federal Rule of Evidence 404(b) allows the introduction of other crimes, wrongs, or acts not to prove character, but instead to prove motive, opportunity, etc.

2. Rule 404(b) was amended, effective December 1, 1991, to require the government to provide pretrial notice of its intent to offer Rule 404(b) evidence. A trial court should consider the following factors in determining the reasonableness of pretrial notice under 404(b): (1) when the government through timely preparation for trial could have learned of the availability of the witness; (2) the extent of prejudice to the opponent of the evidence from the lack of time to prepare; and (3) how significant the evidence is to the prosecution's case. *United States v. Perez-Tosta*, 36 F.3d 1552, 1562 (11th Cir. 1994).

3. Notice of 404(b) testimony given a few minutes before jury voir dire and six days before the witnesses were to be called held reasonable by the Eleventh Circuit. *United States v. Perez-Tosta*, 36 F.3d 1552 (10th Cir. 1994).

4. The First Circuit, in a case of first impression, addressed the issue of the sufficiency of a pretrial 404(b) discovery request as follows:

> Accordingly, at a minimum the defense must present a timely request sufficiently clear and particular, in an objective sense, to fairly alert the prosecution that the defense is invoking its specific right to pretrial notification of the general nature of all Rule 404(b) evidence the prosecution intends to introduce at trial.

United States v. Tuesta-Toro, 29 F.3d 771, 775 (1st Cir. 1994).

5. In a trial for failure to file income tax returns in violation of I.R.C. § 7203, the IRS agent who audited the defendant testified that the defendant was assessed a penalty for failure to declare dividends. The defendant contended that the testimony violated Rule 404(b)'s requirement of advance notice prior to introduction of other evidence. The Ninth Circuit, assuming that the objection was not waived and the statement was attributable to the government, found that in the context of the entire trial, the statement was not so inflammatory as to deny the defendant a fair trial on the charges of willfully failing to file income tax returns. *United States v. Platt*, 1994 U.S. App. LEXIS 14339 (May 24, 1994).

E. Motion for Early Release of Jury Information.

1. The Secretary of Treasury is no longer authorized under Code § 6103(h) to disclose whether a perspective juror in a criminal or civil tax proceedings has been subject to an audit or other tax investigation. The repeal of the provision which previously allowed this applies to judicial proceedings commenced after August 5, 1997.

2. The defendant has an essentially unqualified right to inspect jury lists. *Test v. United States*, 420 U.S. 28, 30 (1975).

3. The Motion requesting jury information may not be denied simply because at the time it is unsupported by a sworn statement of facts. *United States v. Marcano-Garcia*, 622 F.2d 12, 18 (1st Cir. 1980).

4. The defendant's anticipated challenges to the jury selection process as articulated at the time of his motion for inspection may be without merit, and the defendant may still inspect the jury records. *United States v. Alden*, 776 F.2d 771, 775 (8th Cir. 1985). (This view is not accepted in the concurrence of Henley, Sr. Circuit Judge).

5. Many U.S. attorneys keep the names of jurors that serve on panels that have returned guilty verdicts in criminal cases. If you cannot get this information from the U.S. attorney, then you should attempt to get information from the public defender's office, which may have a list of jurors and verdicts reached by the panel that the jurors served on.

6. The defense should remember, however, that in the event that the U.S. Attorney possesses such information, that such information may be available under *Brady*.

F. Defendant's Motion for Discovery and Inspection Pursuant to Rule 16.

1. Documents and tangible objects. Rule 16(a)(1)(C).

2. Defendant's statements. Rule 16(a)(1)(A).

3. Exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963).

4. Presentence reports. Presentence reports obtained pursuant to *Brady* must first be examined *in camera* by the district court, and the district court must subsequently release exculpatory or impeachment material to the defendant while protecting the confidentiality of the remainder of the presentence report.

    a. In *United States v. Jackson*, 978 F.2d 903, 909 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2429 (1993), the Fifth Circuit found the district fulfilled its duty by examining the presentence reports and refusing to turn over information in the presentence reports to defendants because the defendants already had access to all of the information in the reports, and the lack of any evidence in the reports favorable to the defendants.

    b. Similarly, in *United States v. Wallace*, 32 F.3d 921, 930 (5th Cir. 1994), the Fifth Circuit found that the district court had fulfilled its duty under *Brady* by examining the PSI version of events and finding that it did not contain any material differences from the witness/co-conspirator's testimony, and accordingly, would neither be useful for impeachment purposes or favorable to the defense.

    c. Procedure. File a pretrial motion requesting production which is accompanied by trial subpoenas to the probation office that prepared the presentence report. If the trial court will not produce the report prior to the witness's trial testimony, ask the court to review the report after the witness's direct examination to emphasize inconsistencies between the report and the witness's testimony. Finally, if the report is not produced, request that the court place a copy of the report under seal for appellate review. *See* **The Champion**, "Tips and Tactics," pp. 40-41 (Dec. 1994).

5. Rule 16(a)(1)(D)--Reports of experiments and tests including a request for handwriting reports and ink and paper analysis reports for back dating.

6. Rule 16(a)(1)(E)--A written summary of the Government's expert witness testimony under Rules 703, 704 and 705 of the Federal Rules of Evidence.

a. The summary must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications.

b. The requirement of a summary of the bases relied upon should cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under Rule 703, including opinions of other experts.

c. Reciprocal discovery is required by the defendant after the Government complies. Rule 16(b)(1)(C).

d. No time limits are specified for production but it is expected that the parties will make their requests and disclosures in a timely fashion.

e. The 1993 amendment to the Rules "is intended to minimize surprise ..., reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." The plight of a defendant in a criminal tax case was an expressed concern in the adoption of this modification to the Rule. The Committee notes specifically reference a well written article discussing the problems faced by a criminal defense lawyer in a criminal tax case. *See* Eads, Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery. 67 N.C.L. Rev. 577, 622 (1989).

f. For a discussion of two cases which speak to the latitude to be allowed as expert witnesses, see *United States v. Marsh*, 144 F.3d 1229 (9th Cir. 1998) in which the trial court was reversed for allowing too much latitude, and *United States v. Schurrer*, 156 F.3d 1245 (10th Cir. 1998) in which the trial court was affirmed.

g. In *Kumbo Tire Company, Ltd. v. Carmichael*, 119 U.S. 1167, 1999 U.S. Lexis 2189 (March 23, 1989). The Court expanded the trial court's role as the gatekeeper to expert testimony from the scientific evidence at issue in *Daubert* to expert testimony concerning "technical" and other "specialized" knowledge.

h. For other cases in which the defense was successful in reversing the trial court on expert testimony issues, see *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997) – testimony that the defendant had a weak grasp of bookkeeping principles; in *United States v. Lankford*, 955 F.2d 1545 (11th Cir. 1992).

G. Motion for Early Production of Jencks Material.

1. Pursuant to 18 U.S.C. § 3500 and Fed. R. Crim. P. 26.2, the government is required to furnish the defendant with statements of witnesses.

2. In order to give defense counsel sufficient time to review the testimony and prepare for cross-examination, pretrial production should be requested.

3. Pretrial production is a "salutary practice" and is encouraged by the Fifth and Third Circuits. *United States v. Compagnuolo*, 592 F.2d 852, 850 n.3 (5th Cir. 1979); *United States v. Murphy*, 569 F.2d 771, 794 n.10 (3d Cir.), *cert. denied*, 435 U.S. 995 (1978).

4. You may even get the Special Agent's report. *See United States v. Cleveland*, 507 F.2d 731 (7th Cir. 1974) (parts produced at trial under the Jencks Act).

5. The Fifth Circuit in *United States v. Jackson*, 978 F.2d 903, 908-09 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2429 (1993), held that a provision under the local rules requiring the defendant to either object or adopt the presentence report was insufficient to satisfy the Jencks Act. Likewise, with regard to the PSI "version of events," the Fifth Circuit Court of Appeals in *United States v. Wallace*, 32 F.3d 921, 929-30 (5th Cir. 1994), followed its holding in *United States v. Jackson*, and held that a PSI is not a Jencks Act statement.

6. In some districts, 302's are routinely produced. In the event that they are not routinely produced, then you should attempt to obtain them under *Brady* and *Giglio*. You should also consider filing a motion requiring their production and use as Impeachment by Omission. *United States v. Standard Oil Co.*, 316 F.2d 884 (7th Cir. 1963).

7. The D.C. Circuit Court held (In re: Sealed Case (Brady obligations) D.C. Cir. No. 99-3096 8-6-99) that the government has an obligation to search for exculpatory evidence in its possession regarding a defense witness, where that information would be affirmatively favorable to the defendant's assertion of innocence.

H. Motion for Production and Inspection of Grand Jury Minutes.

Prosecutorial misconduct issues: whether improper disclosure of Grand Jury information occurred or any other violations of law.

I. Motion for Disclosure of Agreements Between the Government and Government Witnesses.

1. Although the defendant cannot promise anything to a witness, the government can. Thus the witness's testimony is suspect. However, see *U.S. v. Singleton*, CA 10th, No. 97-3178, 7/1/98 (vacated 7/10/98).

2. Not only agreements with the Department of Justice, but also the FBI, RTC, FDIC, OTS, IRS or any other governmental agency.

3. Immunity for witness or third party, recommendation of leniency, etc.

J. Motion for Bill of Particulars.

1. "In cases involving alleged violations of the federal tax statutes, a bill of particulars is especially desirable in the interests of justice to enable the accused to prepare his defense and avoid surprise at trial and a motion for a bill of particulars in a tax case should be liberally treated." *United States v. Whatley*, 480 F. Supp. 307, 309 (W.D. Okla. 1978).

2. Defendant is entitled to learn which method or methods of proof the government is using to formulate and substantiate the allegations concerning amounts. *Singer v. United States*, 58 F.2d 74 (3d Cir. 1982).

3. Specific items theory. *Rose v. United States*, 128 F.2d 622 (10th Cir.), *cert. denied*, 317 U.S. 651 (1942). Basis for proving intent. *United States v. Congero*, 27 A.F.T.R.2d 71-563 (E.D.N.Y. 1970).

K. Dahlstrom Motions.

1. In *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2363 (1984), the Ninth Circuit reversed a conviction in a tax case because the law was unsettled. The Court stated:

> It is settled that when the law . . . is highly debatable a defendant -- actually or imputedly, lacks the requisite intent to violate it. *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974).

2. In *United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979), the court held that the defendant's actual intent is irrelevant, if the law is uncertain as to whether there is an obligation to pay tax. The court further held that criminal proceeding pursuant to § 7206 "is an inappropriate vehicle for pioneering interpretations of tax law."

a. The Seventh Circuit in *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991), cited *Garber*, holding that criminal prosecutions are no place for the government to try out pioneering interpretations of tax law with respect to the tax treatment of payments to mistresses. *United States v. Harris*, 942 F.2d 1125, 1135 (7th Cir. 1991).

b. The Fifth Circuit in *United States v. Burton*, 737 F.2d 439, 444 (5th Cir. 1984), held that "evidence of legal uncertainty, except as it relates to defendant's effort to show the source of the state of mind, need not be received, at least where, as here, the claimed uncertainty does not approach vagueness and is neither widely recognized nor related to a novel or unusual application of the law." With regard to the defendant's effort to show the source of his state of mind, the Fifth Circuit found it significant that the defendant did not in his proffer suggest that he relied upon the express views of his tax professor/expert in not paying his taxes.

c. In *United States v. West*, 22 F.3d 586, 597-600 (5th Cir. 1994), the Fifth Circuit held that *Garber* was inapposite given the facts in *West*. In *West*, the defendant testified in the district court that he relied on his two bankruptcy experts before structuring the transaction in issue and that he followed their advice. The district court allowed both bankruptcy experts to testify that they advised the defendant how to structure the transactions and that the transactions were perfectly legal.

d. The Sixth Circuit in *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986), declined to follow and rejected *Garber*.

L. Motion to Suppress.

1. Illegally seized evidence.

2. Wiretap or consensual monitoring evidence.

3. Statements of defendant.

4. In *United States v. Ford*, _____ F.3d _____ (6th Cir. July 23, 1999), the Sixth Circuit reversed a defendants' tax conviction because it was based on evidence that was seized in violation of his Fourth Amendment rights. In this case, the government admitted that it seized essentially all of the books and records of the gambling business; not just those records described in the search warrant.

M. Motion in Limine.

1. "Once counsel has determined that there are potentially prejudicial matters which should not properly enter the trial of his client's case, the advantage of having them excluded in advance so that the jury will never know about them is obvious." 63 A.L.R.3d 311, Motions to Exclude Prejudicial Evidence. "The aim of the motion in most instances, then, is to force the movant's opponent to forego any direct or indirect reference to the prejudicial matter at trial unless it is re-offered to the judge in private session." 20 AM. JUR. TRIALS 441.

2. In addition a response to a Motion in Limine may result in disclosure of your opponent's trial strategies. "By directing a pretrial attack toward a sensitive evidentiary area, an attorney can force his adversary to disclose not only what prejudicial evidence he may intend to offer, but also the legal theory on which he relies as establishing the reliance of the evidence." *Id*. at p. 451. The motion may also be used to educate the court about sensitive issues in the case.

3. Use a Motion in Limine to enforce the Government's limited or incomplete answers to your 404(b) and 16(a)(1)(E) motions. For example, in a tax case the Government may give an incomplete response to the requirement that it supply a summary of the "bases and reasons" for its expert witness opinion. A pretrial defense motion in limine should request that the court rule that the Government not be permitted to present to the jury any additional opinion, bases or reasons for expert testimony without first obtaining a ruling of the court on admissibility. The defense may then properly object and assert surprise to changing Government strategies and theories at trial.

4. However, to protect the record, the defendant should not rely upon the pretrial ruling on the motion in limine. *See Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). To preserve error for appellate review the defendant should object to the prejudicial evidence when offered at trial and move to strike where the prejudicial matter is brought before the jury in violation of a pretrial ruling.

N. Motion for Leave to File Additional Pre-Trial Motions Out of Time.

1. Pre-trial motions are often due fairly shortly after arraignment.

2. In complex cases, the defendant must be allowed sufficient time to assimilate data to file discovery motions.

O. Motion to Dismiss for Pre-Indictment Delay.

1. In *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996), the District Court had dismissed the Indictment because of pre-indictment delay. The Fifth Circuit held that in order for a pre-indictment delay to rise to the level of a due process violation which would justify the dismissal of an indictment, the defendant must show a substantial and actual prejudice and that the delay had been intentionally undertaken by the government for the purpose of gaining some tactical advantage. The Court suggested that a stronger showing was required to established actual and substantial prejudice pretrial than would be required in a post-trial setting.

P. Severance and Separate Trial Under Federal Rule of Criminal Procedure 14.

1. In *United States v. Breinig*, 70 F.3d 850 (6th Cir. 1995), taxpayer husband moved for severance and separate trial due to defendant wife's claimed that she lacked the requisite mens rea to have evaded taxes willfully due to her diminished capacity. The court denied the motion and over taxpayer husband's objection, allowed evidence of wife's mental instability caused by husband's adultery, alienation of children and abandonment and manipulation of his ex-wife. The Sixth Circuit reversed the conviction based on the denial of the severance but noted that the unique fact situation constituted one of the few instances where a conviction would be reversed based upon a denial of severance.

Q. Miscellaneous Motion.

In *United States v. Klaphake*, 64 F.3d 435 (8th Cir. 1995), the District Court refused to exempt the defendant's accountant and preparer from its sequestration order during the government's case in chief pursuant to Federal Rule of Evidence 615(3). The Court concluded that the defendant had failed to establish that his attorney could not effectively function in the accountant's absence or that the accountant was unable to present essential testimony without having heard the trial testimony by the witnesses. The Court also noted that since the accountant was a fact witness, her professional relationship with the defendant increased the possibility that she might modify her testimony to comport with the other defense witnesses.

III. **USE OF 17(C) SUBPOENAS**.

A. Rule 17(c) of the Federal Rules of Criminal Procedure provides for the production of documentary evidence.

B. The court may direct that the documents be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may, upon

their production, permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

C. In *United States v. Nixon*, 418 U.S. 683, 699-700 (1974), the court held

> To obtain documents before trial under Rule 17(c), the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend to delay the trial; and (4) the application is made in good faith and is not intended as a "fishing expedition."

D. In my experience, courts apply two different sets of standards for determining production under Rule 17(c). A higher standard is set for Rule 17(c) subpoenas directed to government agencies than those directed to private parties.

E. In many cases the government repeatedly issues trial subpoenas and advises the recipients of the subpoenas that if they turn over the materials in advance of trial, they will not have to report to the courthouse on the day of the trial. This is accomplished by the use of a delay letter which includes or incorporates an agreement of the witness to appear when needed. Once you find out that the government is using this practice, you should consider filing a motion asking the court to have any documents produced in advance of trial delivered to both sides or, at the very least, that those documents which are delivered in advance be made available to defense counsel for inspection and copying.

IV. **THEME OF THE CASE**.

The most important element of trying any case is the theme. The theme guides you in questioning witnesses and using exhibits. Examples of principal themes used in tax cases are mistake, inadvertence, good faith and reliance on others.

A. Rules concerning themes.

1. The themes must be simple.

2. The themes must be credible.

3. The themes must be repeated early and often.

4. The themes must be supported by some evidence (both testimonial and through exhibits).

5. The themes must be referred to in the instructions.

6. The themes must be referred to in closing arguments.

B. Common Sub-Themes in a Criminal Tax Case.

1. The Government has not been fair in the conduct of its investigation.

> "No jury will follow the law to an unjust conclusion .... They may not understand all the technical aspects but they will listen and determine who is telling the truth. ... jurors want the attorneys and parties to play fair and dislike one trial lawyer attacking or intimidating other lawyers."
>
> Smith, **Reading A Jury**, 56 Tex. Bar Journal p. 584 (June 1993).

a. Computations are in Government's favor because of the following errors and unfair assumptions;

b. Agents would not listen to defendant's explanation and had already made up their minds; and

c. Agents were overly aggressive in the investigation, intimated the defendant and others.

2. The defendant has accepted responsibility for the taxes.

> "If there is one generalization that describes Texas jurors, it is their belief that one must take responsibility for one's actions. This belief is certainly not unique to Texas jurors, but it appears that it is particularly characteristic of jurors in this state. As jurors hear about a case and evaluate the evidence, they make decisions about whether each party has met its responsibilities. If a party has not lived up to its responsibilities, Texas jurors can be especially unforgiving."
>
> Strapp and Singleton, **The Perspectives of Texas Jurors**, 56 Tex. Bar Journal p. 578 (June 1993).

a. "Consistent with the general latitude afforded the defense in the presentation of its case, most courts have regarded the filing of amended returns and payment of delinquent tax as admissible evidence to show lack of willfulness. *See Berkovitz v. United States*, 213 F.2d 468 (5th Cir. 1954); *Heindel v. United States*, 150 F.2d 493

(6th Cir. 1945) (prompt payment of additional tax); *United States v. Stoelr*, 196 F.2d 276 (3rd Cir. 1952), *cert. den'd*, 344 U.S. 826 (an offer in compromise made fifteen months after indictment held not admissible, but note obiter stating that an amended return promptly filed together with payment of tax would have been admissible." Manual for Criminal Tax Trials (July 1973).

b. The filing of an amended tax return tends to show acceptance of responsibility, especially where a principal defense theme is mistake, inadvertence, good faith and/or reliance on others

c. The timing and manner of the filing of an amended tax return is a strategic decision. Special care must be taken to see that the amended return is accurate and complete; and consistent with all trial theories.

3. The defendant has already paid a heavy price.

a. Embarrassment with banks and business associates;

b. Family stress;

c. Decline in business; and

d. Legal fees and costs.

4. Expert testimony regarding the defendant's mental state.

a. May be possible to introduce expert testimony regarding the defendant's mental state. See *United States v. Sholl*, 166 F.3d 964 (9th Cir. 1999), *United States v. Lankford*, 955 F.2d 1545 (11th Cir. 1992) and *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997).

V. **TAX CRIMES AND DEFENSES**.

A. Tax Evasion - 26 U.S.C. § 7201.

1. Elements.

a. A substantial tax is due and owing;

b. An affirmative act to evade or defeat the tax; and

c. Willfulness (a voluntary intentional violation of known legal duty).

2. Evasiveness. A violation of § 7201 includes both the offense of willingly attempting to evade or defeat the assessment of a tax and the offense of willfully attempting to evade or defeat the payment of a tax. *United States v. Huebner*, 48 F.3d 376 (9th Cir. 1994), and cases cited therein. The affirmative act of evasion of payment "involves conduct designed to place assets beyond the government's reach after a tax liability has been assessed." "Affirmative acts of evasion of payment include: placing assets in the name of others; dealing in currency; causing receipts to be paid through and in the name of others; and causing debts to be paid through and in the name of others." *United States v. McGill*, 964 F.2d 222, 230 (3d Cir. 1992).

3. Methods of Proof.

   a. Net Worth. This method of proof assumes that a taxpayer's increase or decrease in net worth plus non-deductible expenses, less non-taxable receipts, should equal taxpayer's net income. If there is a substantial difference between the figures, the inference that taxable income was not reported is sufficient to support a conviction. *United States v. Cleveland*, 477 F.2d 310, 311 (7th Cir. 1973).

   b. Deposits and Expenditures Method. The government need only prove that deposits have the appearance of income. The burden is on the defendant to explain the nature of the deposits. *United States v. Esser*, 520 F.2d 213, 217 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976). However, see *United States v. D'Agostino*, 145 F.3d 69 (2nd Cir. 1998). In that case, the circuit court reversed a conviction for tax evasion because the government had failed to prove that there were sufficient earnings and profits in the corporation to generate income, when proceeds were distributed from the corporation.

   c. Specific Items Method. The government shows that certain items of income were not reported on the return.

4. Defenses.

   a. Cash Hoard. Hard to prove and not a theme juries readily accept.

   b. Subjective Good Faith. *Cheek v. United States*, 111 S. Ct. 604 (1991) (A defendant's good faith belief need not be objectively reasonable to negate intent).

   c. Good Faith Reliance. Reliance on accountants and tax advisors to whom the taxpayer has given all material facts. *United States v. Charroux*, 3 F.3d 827, 831 (5th Cir. 1993). For discussion of the

good faith instructions, see *United States v. Chastain*, 84 F.3d 321 (9th Cir. May 17, 1996). For discussion of reliance instruction, see *United States v. Evangelista*, 122 F.3d 112 (2nd Cir. 1997).

d. Reliance on Co-Conspirators. *United States v. Regan*, 937 F.2d 823 (2nd Cir. 1991) (Reliance on co-conspirator who testified regarding his good faith belief of tax treatment of transaction.)

e. Amended Returns. Defendants should understand that amended returns constitute admissions. In certain cases, defendants can even be indicted for filing false amended returns. *See,* for example, *United States v. Barrow*, 1997 U.S. App. Lexis 16239 (6th Cir. July 2, 1997).

f. Immunity and Voluntarily Disclosure.

(1) *United States v. Tenzer*, 127 F.3d 222, 1997 U.S. App. Lexis 25263 (2nd Cir. Sept. 19, 1997). This case held that the defendant, a tax lawyer, had failed to comply with the voluntarily disclosure policy, and therefore, reversed a District Court's decision to dismiss the indictment. The case is interesting though because it implies that if Tenzer had, in fact, complied with the policy, that the Court might have affirmed the lowers court's decision.

(2) *United States v. Noske*, 1997 U.S. App. Lexis 15039 (8th Cir. 1997) held that a taxpayer could still be convicted in spite of an immunity agreement. The case is important for defense counsel who attempt to negotiate immunity agreements for their clients.

(3) *United States v. Krilich*, 159 F.3d 1020 (7th Cir. 1998) Court held that the defendant Robert Krilich waived the protections of the Federal Rules of Civil Procedure 11(e)(6), providing the inadmissibility of plea negotiation statements, simply by virtue of his lawyer's cross-examination of a witness where the cross-examination was designed to cast doubt upon the government's case.

B. Section 7206(1) - Signing a False Return.

1. Elements.

a. Defendant willfully made and subscribed a return that the return was false as to a material matter.

b. It contained a written declaration that was made under penalties of perjury.

c. That the defendant did not believe that it was true in every material matter.

d. Section 7206(1) does not require that the prosecution prove the existence of a tax deficiency. However, the issue of materiality is a mixed issue of fact and law which must be submitted to the jury. *See United States v. Gaudin*, 115 S.Ct. 2310 (1995).

2. Defenses.

a. Good faith.

b. Reliance.

c. Even though § 7206(1) does not require the government to show an actual deficiency, the defendant should introduce evidence, if available, negating the existence of a tax deficiency to show that the defendant did not possess the requisite intent to violate § 7206(1). *See United States v. Taylor*, 574 F.2d 232, 234-35 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978).

3. Materiality.

a. In *United States v. Aramony*, 88 F.3d 1369, (4th Cir. 1996), the defendants were charged with scheming to defraud the United Way of America. The Court ruled that a materiality finding by the jury was not required in a § 7206 case where there was no objection made at the time of trial and where the jury had already found that the omitted deductions and income were substantial in amount. The Court found that because the test of materiality is broader than the test for substantiality, the jury's independent finding of substantiality necessarily included a finding of materiality.

b. In *Neder v. United States*, 119 S.Ct. 1827 (1999), the Court held that the district court's failure to submit the materiality element of the tax offense to the jury was an error under *Gaudin*. However, the error was subject to the harmless-error analysis and was harmless because materiality was not in dispute and thus, did not contribute to the verdict. The failure of the district court to submit the materiality instruction was over the objection of the defendant.

C. Section 7206(2) - Aiding and Assisting in False Statements.

1. Elements.

a. A defendant willfully aided and/or assisted in procuring, counseling or advising in the preparation of a return that is false or fraudulent.

2. Defenses.

a. Good faith.

b. Reliance.

c. Attempt to demonstrate a lack of intent to violate § 7206(2) by establishing the absence of a tax deficiency.

D. Section 7212 - Attempts to Interfere with the Administration of the Internal Revenue Laws.

1. The Eleventh Circuit in *United States v. Popkin*, 943 F.2d 1535 (11th Cir. 1991), held that the defendant's conviction for violating § 7212(a) was supported by evidence that the defendant created a corporation to enable his client to disguise the character of income earned on drug sales while avoiding reporting taxable income. Section 7212(a) does not require force or threats of force. The word "corruptly" used in § 7212(a) prohibits all activities that seek to thwart the efforts of government officers and employees in executing the laws enacted by Congress. "In a system of taxation such as ours which relies principally upon self-reporting, it is necessary to have in place a comprehensive statute in order to prevent taxpayers and their helpers from gaining unlawful benefits by employing that 'variety of corrupt methods' that is 'limited only by the imagination of the criminally inclined.'" *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991), and case cited therein.

2. *United States v. Kassouf*, N.D. Ohio, 948 F.Supp. 36 (Nov. 19, 1996). The defendant argued that the indictment failed to allege that the defendant engaged in conduct which violates that clause because § 7212 requires a

nexus between the defendant's act and the judicial proceeding. The Court held that the defendant could not be held criminally liable for conduct intended to obstruct or impede a government action prior to the commencement of government action. Also see the circuit court opinion upholding the district court in *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998).

3. *United States v. Bowman,* 173 F.3d 595 (6th Cir. 1999). The Sixth Circuit limited the *Kassouf* opinion to its facts, and held that an individual's deliberate filing of false forms with the I.R.S. specifically for the purpose of causing the I.R.S. to initiate action against the taxpayer is encompassed within § 7212(a)'s proscribed conduct.

E. Conspiracy - 18 U.S.C. § 371.

1. Elements.

   a. The defendant entered into an agreement,

   b. to obstruct a lawful function of the government,

   c. by deceitful or dishonest means, and

   d. committed at least one overt act in furtherance of the conspiracy.

   United States v. Caldwell, 989 F.2d 1056, 1059 (9th Cir. 1993), and cases cited therein.

2. Klein Conspiracy. A conspiracy to defraud in tax cases is most frequently to "impede, impair, and obstruct and defeat the lawful functions of the Treasury Department and the determination, assessment and collection of income taxes" (referred to as a "Klein Conspiracy" after *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958)).

3. In *United States v. Huebner*, 48 F.3d 376, the Ninth Circuit upheld the conviction of the defendant for twelve counts of aiding and abetting taxpayers in the attempted evasion of payment of income taxes under § 7201 and for conspiracy to commit the attempted evasion offense and to defraud the United States by obstructing collection of income taxes under 18 U.S.C. § 371. The defendant assisted others in filing bankruptcy petitions which imposed the automatic stay and released levies on the taxpayers' accounts. The bankruptcy petitions included false assertions of heavy debt.

4. *United States v. Alston*, 77 F.3d 713 (3rd Cir. 1996). Where a defendant is charged with both a conspiracy to commit a separate offense and a conspiracy to defraud the United States, and where both conspiracy charges are based on the same underlying offense, if there is not sufficient evidence to sustain a conviction for conspiring to commit the separate offenses, the defendant cannot be convicted of conspiring to defraud.

5. Co-Conspirator's statements. Pursuant to Federal Rule of Evidence 801(d)(2)(E), statements by a co-conspirator made during the conspiracy and in furtherance of the conspiracy are admissible. However, FRE 806 allows the credibility of the declarant to be attacked, and if attacked, supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness. For example, prior inconsistent statements or conduct.

6. Intent. In *United States v. Funkin*, 119 F.3d 1276 (7th Cir. 1997), the defendant was convicted of a *Klein* conspiracy under 18 U.S.C. 371. The Court held that "intent" element of § 371 requires the government to prove "not that the conspirators were aware of the criminality of the objective, but that the conspirators knew of the liability for federal taxes." This holding appears to mean that the government in order to prove a violation of the specific substantive tax statutes must prove "specific intent" but can get by with general intent under the conspiracy statute.

VI. **JOINDER**.

A. In many tax cases, the government will attempt to join other criminal violations with the Tax counts. The defense should attempt to avoid this, if at all possible, because of the overlapping effect of evidence and the prejudice which it may bring to the Tax counts.

B. *United States v. Bezmalienovic*, S.D. N.Y. 1996 U.S. Dist. Lexis 18976 (Dec. 23, 1996). In this case, the defendant was charged with insurance fraud, government contract fraud and attempts to interfere with the administration of the Internal Revenue laws in violation of 26 U.S.C. § 7212(a). The issue raised is whether there was proper joinder of all of these offenses because they are of a "similar character to each other." Further, the government attempted to keep all counts of the indictment joined under "common scheme or plan" rationale. The Court ruled that joinder of the tax charges to the government contract fraud and insurance fraud was improper as they were not sufficiently similar or connected to each other under a common scheme or plan.

C. *United States v. Jordan*, 112 F.3d 14 (1st Cir. 1997). The defendant was indicted for various tax issues, mail fraud and money laundering charges. The Court of Appeals noted that "a defendant may deserve a severance of counts where [he] makes a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other" citing *United States v. Alosa*, 14 F.3d 693 (1st Cir. 1994). Specifically, the Appellate argued that he needed to testify in order to present a good faith defense to the tax charges under *Cheek v. United States*, 498 U.S. 192 (203-204) 1991. The Appellate Court concluded that the Joinder likely had the effect of eviscerating the Appellate's planned *Cheek* defense to the tax charges and found that prejudice existed by requiring the evidence to be presented that would not have been admissible at a separate trial.

VII. **JURY SELECTION**.

A. Rules of Procedure.

1. "The court may permit the defendant or the defendant's attorney and the attorney for the Government to conduct the examination of perspective jurors or may itself conduct the examination. In the latter event, the court shall permit the defendant or the defendant's attorney and the attorney for the Government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the perspective jurors such additional questions by the parties or their attorneys as it deems proper." Fed. R. Crim. P. 24(a).

2. The Government is entitled to six preemptory challenges and the defendant or defendants jointly to ten preemptory challenges. If there is more than one defendant, the court may allow the defendants additional preemptory challenges and permit them to be exercised separately or jointly." Fed. R. Crim. P. 24(b). "Alternative jurors may also be selected in which case each side is entitled to one preemptory challenge if one or two alternative jurors are to be empaneled." Fed. R. Crim. P. 24(c).

B. General Considerations.

1. The concept of a psychological profile of a juror is based upon the notion that people will decide issues based upon fundamental aspects in their own backgrounds. Jury psychologists will frequently recommend the scoring of witnesses based upon factors in the case which appear to be psychologically significant. For example, the age, sex, race, religion, marital status and educational background of the defendant may all make some difference on the kind of jury you want. However, if the clinical psychologist is any good, he will tell you that a scoring of jurors is not a substitute for the trial attorney's judgment. "... if you have a juror you really do not like, then

challenge him no matter how high his score." *See* McElhaney's Trial Notebook, 2d Ed., p. 75. "More important than these stereotypes is how individual jurors seem to respond to you and your client .... Most of this will be expressed in body language." *Id*., p. 76.

2. Minorities are not necessarily sympathetic to the defendant in a white collar criminal case. However, in today's environment, an African-American juror may be more inclined to be receptive to certain Government misconduct themes. Recent studies of Hispanic population indicate that Hispanics' political preferences are more consistent with socio-economic positions than ethnicity. Hispanics may hold conservative family and social values and tend to be more sympathetic to law enforcement than to a defendant in a criminal case.

3. Female jurors tend to be more concerned with the ethical implications of conduct involved in the lawsuit than men. Men do not approve of unethical conduct .. but seem to be more willing to view it as "business as usual."

VIII. **OPENING STATEMENTS**.

IX. **CROSS-EXAMINATION OF THE SPECIAL AGENT**.

A. The Rules of Evidence.

1. "Cross-examination should be limited to the subject matter of the direct examination **and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.**" (Emphasis supplied.) Rule 611(b), Federal Rules of Evidence.

2. "Ordinarily leading questions should be permitted on cross-examination." Rule 611(c), Federal Rules of Evidence.

3. Rule 612 of the Federal Rules of Evidence and the Jencks Act, 18 U.S.C. § 3500, describe the circumstances under which the defendant is entitled to have "statements" produced for cross-examination and impeachment.

4. "In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel." Rule 613(a), Federal Rules of Evidence.

5. "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny

the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise required." Rule 613(b), Federal Rules of Evidence.

6. When the government is attempting to introduce evidence of alleged statements by a co-conspirator against a defendant, the defendant is entitled to attack the credibility of the declarant by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Rule 806 of the Federal Rules of Evidence.

B. The Objectives of Cross-Examination.

1. Minimizing or even destroying the effect of direct examination; and

2. Developing independent evidence on behalf of your client.

C. General Considerations.

1. Do you want to cross-examine at all?

a. "... far more lawyers are done in by asking questions than are ever damaged by silence." James W. McElhaney, **McElhaney's Trial Notebook (2d ed.)**, pg. 265.

b. Has the direct examination really hurt you? Will cross-examination serve to enhance or mitigate the harm?

c. Can you effectively develop important defense themes through cross-examination? Do you have sufficient controls to avoid serious injury while you attempt to do so?

2. If you undertake cross-examination, you must control the witness through complete knowledge of the facts, effective use of the documents, organization, and the proper form, order and structure of questions.

a. "Cross-examination is the art of honest innuendo." *Id*. at p. 264.

b. Ask short leading questions that are phrased in terms you expect to use in your closing argument. Keep it simple.

c. Train the witness to affirm your questions by asking a series of questions which he or she must clearly affirm.

d. Punish the witness when he or she fails to properly affirm your question by refreshing memory and impeaching with prior memoranda and documents. Be gentle and polite as you punish (since juries don't like lawyers anyway), but drag out the punishment.

e. After the witness has been trained, if you reach that point, attempt to bridge the gap between questions for which you have controls and those points you need to develop without tangible controls. Don't let the witness know that you are without a control by mixing the uncontrolled questions in with those for which you have controls.

f. Organization is the key to effective cross-examination.

3. Illustrate defense themes during the cross-examination with charts and exhibit blow-ups.

4. Use phrasing in cross-exam questions to condition the Court to grant requested jury instructions. Where the Court has heard key phrases repeatedly during trial, it is more inclined to allow specific wording in the jury instruction which sets forth the defendant's theme of the case.

D. Structure of the Examination.

1. Start strong. "Come out smoking." David H. Berg, **Secrets of Cross-Examination**, 20 Litigation (Sp. 1994), p. 6.

2. Bring out points of agreement first.

3. Shift between points of agreement and the development of defense themes.

a. Use "signposts" to tell the jury when you switch themes or topics. *E.g.*, "Now let us turn to the things you did before you made your first contact with my client."

b. Provide the jury with alternatives. Have the witness acknowledge that there are points of disagreement to be decided by the jury.

c. Empower the jury. Have the witness acknowledge that the jury must decide the disputed facts.

4. Develop defense themes for the closing argument. While the principal defense themes will be specific to the case, some general themes in criminal tax cases include the following:

a. My client cooperated in the following ways .... Be specific about points of cooperation, because the Agent will never unqualifiedly agree that the client cooperated; but will have to agree with specific points if the questions are correctly put.

b. Amended returns have been filed and the taxes have been paid. (Admissible in some circuits to show lack of willfulness). The Fifth Circuit in *Hill v. United States*, 363 F.2d 176, 180 (5th Cir. 1966) upheld the District Court's conviction of the Defendant under § 7201. The Fifth Circuit stated that: "On the issue of willfulness the prompt correction of errors by filing amended returns and by making tax payments is relevant. Conversely, where a Defendant has an opportunity to correct his return, and is put on notice that such correction is necessary, his failure to take steps to file an amended return is a proper matter for a jury to consider in determining intent or lack of intent." *Hill v. United States*, 363 F.2d 176, 180 (citations omitted). In *United States v. Richard*, 471 F.2d 105, 108 (8th Cir. 1973) the Eighth Circuit found that the probative value of filing amended returns was seriously lessened when filed after the Defendant learned of the government's investigation.

c. The investigation has lasted for years and my client has already paid a heavy price.

d. If the Government opens the door, and it frequently does, tell the jury about the coming civil penalty assessments.

e. The Government's investigation was a "one-sided" search for information.

f. The defendant was not given a chance to explain and/or his explanations were ignored or summarily rejected. Consider having the attorney take the blame for the failure of the defendant to come forward at an earlier time.

g. The agents were careless about preserving evidence and failed to follow IRS manuals and procedures.

5. Impeach the agent's credibility and/or the quality of the investigation.

a. Link impeaching materials to what hurts. That is, tie the impeaching information directly to an important Government theme. *Id*. at p. 263.

b. Validate impeaching materials before the attack. Tie the agent down so he or she cannot explain away an inconsistency when the inconsistency is finally put to him. *Id*. at p. 274.

6. Close strong.

a. Plan something good for the closing.

b. Close with your most important theme when you can, but close strong even if you have to do so with a lesser point.

c. Don't push it. If you have substantially completed your examination and score a good point, close.

d. Remember the rule of primacy. The jury will best remember the first and last points of the cross-examination.

X. SHOULD THE DEFENDANT TESTIFY?

A. Boris Kostelanetz, one of the premier criminal tax trial lawyers wrote:

> "I believe that generally a white collar defendant should not testify. . . . I prosecuted white collar cases for nine years and never lost a case -- not because of my brilliance, but because the defendants insisted on removing any reasonable doubt about their guilt by testifying."

Boris Kostelanetz, "White Collar Crime -- The Defendant's Side", **The Litigation Manual**, 2d Edition, American Bar Association, Section of Taxation.

B. Edward Bennett Williams stated:

> "I am saying that if the defendant does not take the stand, he is in tremendous peril of being convicted. . . . If you stand on the government's case, statistics show you are not going to be successful too often. It's a daring gamble to take, because one of the jurors, you can be certain, will say: 'well, if he's so innocent, why in hell didn't he get on the stand?'"

C. Some Questions to Ask Before Deciding Whether to Put the Defendant on the Stand:

1. Does the defendant have prior convictions?

2. What additional evidence will be allowed into the case that otherwise has been excluded?

3. Is there any uncharged misconduct to turn the jury against the defendant?

4. How far ahead or behind are you at this point in time?

5. How good a witness would the defendant make?

6. Are any other defendants going to testify?

7. What effect will the defendant's testimony have on sentencing?

8. Please note if the Judge believes that the defendant is lying on the stand, an additional two points for obstruction of justice is certainly possible. *See* U.S.S.G. § 3C1.1, *United States v. Wilson*, 985 F.2d 348 (7th Cir. 1993).

XI. **JURY INSTRUCTIONS**.

A. As in civil litigation, it is a sound practice to prepare the defense instructions well before the trial begins. The proposed instructions should reflect the defense themes and should serve as a reference tool in preparing for the opening statement, the examination of witnesses and the closing argument.

1. A defendant is entitled to have the court instruct the jury on the theory of the defense as long as it has some basis in the evidence and has legal support.

2. The Fifth Circuit in *United States v. Burton*, 737 F.2d 439 (5th Cir. 1984), held the trial court erred in instructing the jury that as a matter of law a good faith belief that wages were not income tax did not constitute a defense, the court, citing its prior cases, explained:

> Moreover, there may be concern that such objective limitations by the judge are necessary to prevent confusing "proofs" of law as an evidentiary fact. Each such concern is understandable but unfounded. The quick answer is that, apart from the constitutional strictures explained in *United States v. Johnson*, such limitations upon defendants serve no practical purpose, for they will not materially affect the nature of the trial evidence or the trial. A jury is the ultimate discipline to a silly argument. Here the district court was understandably frustrated by the implausibility of Burton's contention, but he ought not to have taken the question from the jury.
>
> *United States v. Burton*, 737 F.2d 439, 443 (5th Cir. 1984).

B. Good faith instruction pursuant to *Cheek v. United States*, 111 S. Ct. 604 (1991).

1. **Example**: Good faith is an absolute defense to the income tax crimes alleged by the government. In order to carry its burden of proof, the government must negate the defendant's claim of ignorance of tax law and that because of his misunderstanding of the law, he had a good faith belief that he was not violating the tax laws. In this regard, the defendant's good faith misunderstanding of the tax law need not be objectively reasonable. If you find the defendant believed in good faith, albeit incorrectly, that no tax was due on the transaction at issue, then the defendant is not guilty of the alleged income tax violations. Defendant need not introduce any evidence of his good faith misunderstanding. Instead, the government bears the burden of proving beyond a reasonable doubt that the defendant did not hold such a good faith misunderstanding.

2. In *Richey v. IRS*, 9 F.3d 1407, 1413 (9th Cir. 1993), the Ninth Circuit held an instruction that applied the *Cheek* standard of good faith to willfulness and negligence under I.R.C. §§ 6694(a) and 6694(b) was improper. The *Cheek* good faith instruction was correct for § 6694(b) (willfulness) and erroneous for § 6694(a) (negligence).

3. Regardless of the fact that the evidence presented at trial was sufficient to sustain the conviction, the Eleventh Circuit in *United States v. Morris*, 20 F.3d 1111, 1113 (11th Cir. 1994), held that the trial court's failure to instruct the jury on the defendant's good faith defense constituted reversible error. The trial court used the term "willfully" in defining the elements of the crime

and only later in the instructions when defining the term "knowingly" did the court include good faith language of mistake or accident.

4. Some courts will refuse to charge the jury on "good faith" unless the defendant testifies; however, this should not be the rule. Counsel should object specifically that the good faith charge is properly raised by the evidence and that the failure to charge based on the defendant's decision not to testify infringes on the defendant's Fifth Amendment rights.

C. Reliance on professional. A defendant in order to avail himself of the defense must demonstrate that he provided full information to the preparer and then filed the return without having reason to believe it was incorrect or, in other words, the defendant must show (1) he relied in good faith on a professional, and (2) he made complete disclosure of all relevant facts. *United States v. Charroux*, 3 F.3d 827, 831 (5th Cir. 1993), and cases cited therein. *U.S. v. Lewis*, 93 F.3d 1075 (2nd Cir. 1996)

D. Evil purpose and bad motive. The Fifth Circuit held that *Cheek* does not require an instruction that the government must prove that the defendant acted in bad faith or with evil intent. *United States v. Masat*, 948 F.2d 923, 932 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 108 (1992); *see United States v. Powell*, 936 F.2d 1056 (9th Cir. 1991); *United States v. Pomponio*, 429 U.S. 10 (1976).

E. Deliberate ignorance. The Fifth Circuit held that the deliberate ignorance charge is to be given only in rare instances because of the risk that the jury will find willfulness without evidence that the defendant knew of his duty under the law. However, the Fifth Circuit upheld the instruction in this case because the defendant disputed his knowledge of his duty to pay fuel excise taxes while the testimony showed that his bookkeepers informed him of this duty. *United States v. Wisenbaker*, 14 F.3d 1022 (5th Cir. 1994).

F. Lesser included offense. In *United States v. Doyle*, 956 F.2d 73 (5th Cir. 1992), the defendant conceded that he failed to file timely tax returns and that he submitted W-4 forms with inaccurate information. The Fifth Circuit found that the jury could have acquitted the defendant of the § 7201 charge and still convicted the defendant of the § 7203 charge. The Fifth Circuit held that the defendant was entitled to a lesser included offense instruction because there was a disputed factual element of the § 7201 felony (whether Doyle willfully filed the inaccurate W-4 forms) that was not essential to finding the defendant guilty of the lesser included § 7203 misdemeanor offense of failure to file a tax return. Under current Federal sentencing guidelines, you should make sure and compute the sentence under the lesser included charge because it may be equal to the sentence under the felony charge.

G. Conspiracy.

1. In *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993), the district court erred in failing to instruct the jury that in order to find a conviction for conspiracy under 18 U.S.C. § 371, that the defendant must have entered into an agreement to obstruct a lawful function of the government **by deceitful or dishonest means**. The Ninth Circuit makes it clear that without language to the effect that the agreement must have been carried out by deceitful or dishonest means, "the government may, if it wants to, explicitly outlaw conduct it thinks unduly obstructs its functions. . . ." The Ninth Circuit was "unwilling to conclude Congress meant to make it a federal crime to do *anything*, even that which is otherwise permitted, with the goal of making the government's job more difficult." *United States v. Caldwell*, 989 F.2d 1056, 1060 (9th Cir. 1993).

2. In *United States v. Knapp*, 25 F.3d 451, 455 (7th Cir. 1994), the defendant argued the district court erred by failing to instruct the jury that in order to find him guilty of conspiracy to "defraud" the United States, he had to have agreed to impede or obstruct the IRS by deceitful or dishonest means. The defendant cited *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993), in support of the defendant's argument. The Seventh Circuit rejected defendant's argument, finding that the jury was instructed on all essential elements of the crime and that the failure of the district court to define "defraud" with the "deceitful and dishonest" language requested by the defendant was not plain error. The Seventh Circuit found the defendant's reliance on *Caldwell* misplaced because according to the Seventh Circuit, *Caldwell* merely stands for the proposition that a defendant cannot be found guilty of defrauding the United States without some showing of fraud. *United States v. Knapp*, 25 F.3d 451 (7th Cir. 1994). NOTE: It was the failure of the defendant to properly object at trial that led to the "plain error" standard of review on appeal.

3. In *United States v. Licciardi*, 30 F.3d 1127 (9th Cir. 1994), the defendant, a grape broker, and others misrepresented that grapes sold to wine producers were Zinfandel grapes, which at the time were selling at a much higher price than similar grapes. At trial the defendant was found guilty of 18 U.S.C. § 371, conspiracy to defraud the United States and its agency, the Bureau of Alcohol, Tobacco and Firearms ("BATF"), by obstructing, impairing and defeating the lawful function of the BATF to insure the integrity and varietal designations of wine through examination and analysis of records maintained honestly and accurately and free from deceit, trickery, fraud and dishonesty. The court held that the fact that the incidental effects of the defendant's actions would have been to impair the functions of the BATF did not confer upon the defendant the mens rea of accomplishing that object. "It is instructive that *Pettibone* in 1893, *Hammerschmidt* in 1924, and *Tanner* in 1989 are all instances where the Supreme Court rebuffed a prosecutor's imaginative and unjustified expansion of the statute. We have only recently had to do the same. *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993)." *United States v. Licciardi*, 30 F.3d 1127, 1133 (9th Cir. 1994). The Ninth Circuit in *Licciardi*, however, did uphold the defendant's conviction on conspiracy to commit mail fraud.

4. The following is a sample jury charge on the meaning of defraud under 18 U.S.C. § 371:

> Title 18, United States Code, Section 371 makes it a crime for anyone to conspire with someone else "to defraud the United States." Specifically, Count 1 of the indictment alleges that if the defendant conspired "to defraud the United States by impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service . . ." you are instructed that "defrauding the United States" means obstructing the operation of any government agency by deceitful or dishonest means. Thus, to find the defendant guilty, you must find he conspired to obstruct the government through deceitful or dishonest means. Simply conspiring to make the government's job harder is not a crime. Accordingly, if you find that the defendant simply conspired to make the government's job harder, you may not find him guilty of conspiring to defraud the United States.

XII. **DECLINE OF THE "EXCULPATORY NO" DOCTRINE**.

A. The "Exculpatory No" Doctrine.

1. 18 U.S.C. § 1001 prohibits knowingly and willfully making a false statement which is material regarding a matter within the jurisdiction of a department or agency of the United States. However, a judicial exception has evolved. Section 1001 is generally not applicable to false statements that are essentially exculpatory denials of criminal activity. This exception is commonly referred to as the exculpatory no exception or exculpatory no doctrine.

B. Acceptance by the Courts.

1. The Fifth Circuit in *Paternostro v. United States*, 311 F.2d 298, 305 (5th Cir. 1962), was the first circuit to accept the exculpatory no doctrine. However, the Fifth Circuit expressly rejected the exculpatory no doctrine in *United States v. Rodriguez-Rios*, 14 F.3d 1040, 1045 (5th Cir. 1994).

2. The Fourth, Eighth and Ninth, Circuits apply the following test in determining whether a false statement violates § 1001. The exculpatory no doctrine applies when: (1) the false statement is unrelated to a claim to a privilege or a claim against the government, (2) the declarant is responding to inquiries initiated by a federal agency or department, (3) the false statement does not impair the basic functions entrusted by law to the agency, (4) the government's inquiries do not constitute a routine exercise of administrative responsibility, and (5) a truthful answer would have incriminated the declarant. *See United States v. Moore*, 27 F.3d 969 (4th Cir. 1994); *United States v. Taylor*, 907 F.2d 801, 804 (8th Cir. 1990); *United States v. Equihua-Juarez*, 851 F.2d 1122, 1124 (9th Cir. 1988).

3. The First, Tenth and Eleventh Circuits have also adopted the exculpatory no doctrine. *See United States v. Chevoor*, 526 F.2d 178, 184 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *United States v. Fitzgibbon*, 619 F.2d 874, 879-80 (10th Cir. 1980); *United States v. Tabor*, 788 F.2d 714, 717-19 (11th Cir. 1986).

4. The Seventh Circuit has adopted the exculpatory no doctrine in a very narrow and limited fashion. *Moser v. United States*, 18 F.3d 469, 473 (7th Cir. 1994).

XIII. **CHARACTER WITNESSES**.

A. The Rules of Evidence.

1. Evidence of a pertinent trait of character offered by an accused is admissible for the purpose of proving action in conformity therewith on a particular occasion. Rule 404(a)(1).

2. In criminal tax cases, character is in issue only circumstantially and, therefore, proof of a character of truthfulness and/or honesty may be made by testimony as to reputation or by testimony in the form of an opinion.

   a. "According to the great majority of cases on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. *Michaelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948); Annot., 47 A.L.R.2d 1258. The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew as well as whether he had heard." Notes of Advisory Committee on the 1972 Proposed Rules.

3. Relevant character evidence is excepted from the rule against hearsay. Rule 803(21).

4. The Pattern Jury Instructions for the Fifth Circuit contain the following language:

> Where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law abiding citizen, you should consider such evidence along with all the other evidence in the case.
>
> Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime .... Pattern Jury Instr., Crim., 5th Cir., p. 21 (1990).

B. General Observations.

1. Where a principal defense theme is mistake, inadvertence, good faith and/or reliance, character evidence may be very useful to the defense. In such cases, the defendant should call from three or four character witnesses, as permitted by the court, to testify to the defendant's reputation for honesty, integrity, and as a law abiding citizen. Reputation for truth and veracity may be offered in cases involving violations of Section 7206(1) and/or where the defendant has testified in the case.

2. In general, the character witnesses should be a series of life associates of the defendant, persons who have personal knowledge of the defendant's life history and life circumstances. For example, the testimony of a high school teacher who has known the defendant 20 years would be given greater weight than would the testimony of a highly placed public official who may have known the defendant for only a short period of time and/or in a limited capacity. In short, even though the inquiry is about reputation, the jury will also learn more about the defendant's past life through these witnesses.

3. The character witnesses should be carefully prepared for the cross-examination questions. These would normally include some reference to whether or not the witnesses' testimony would change or be affected "if you heard that ...." Here the prosecution will refer to some fact or circumstance inconsistent with good character. The prosecutor must have a reasonable factual basis for the question. Normally, it would be most effective to refer to a fact or circumstance already known to the jury.

XIV. **CLOSING ARGUMENTS**.

XV. **SENTENCING**.

A. Heartland.

United States v. Goldberg, 105 F.3d 770 (1st Cir. 1997) held that a 2-level increase as an organizer, leader, manager . . . was appropriate. The interesting point about this case, is that the District Court departed downward 2-levels because it thought that the Appellate's conduct was outside the "heartland" contemplated by the *Klein* conspiracy sentencing guideline. The Sentencing Judge stated that although the Appellate's conduct "as a matter of law constitutes a *Klein* conspiracy, as a matter of sentencing law, it seems to be inappropriate to apply the *Klein* conspiracy guidelines." The Sentencing Judge chose to depart downward two levels because he thought the Guideline Section for aiding and assisting tax fraud in U.S.S.G. § 2T1.4 was more reflective of the Appellant's conduct than the *Klein* conspiracy guideline in U.S.S.G. § 2T1.9. The Appellate Court described that "the Government, sensibly in our view, has chosen not to pursue an appeal from the downward departure."

B. No Abuse of Trust.

The Eleventh Circuit in *United States v. Barakat*, 130 F.3d 1448, 1997 U.S. App. Lexis 35099 (11th Cir. 1997) held that the sentencing enhancement for abuse of a position of trust was not applicable to an income tax case. The Court expressly disagreed with the Seventh Circuit's holding in *United States v. Bhagavan*, 116 F.3d 189, 190 (7th Cir. 1997) in which an enhancement was held to apply. See also *United States v. Cianci*, 154 F.3d 106 (3rd Cir. 1998).

C. Must Read Opinion.

United States v. Bart and Stewart, 973 F.Supp. 691; 1997 U.S. Dist. Lexis 13138 (W.D. Tex. 1997). This opinion by District Judge Fred Biery justifying his downward departure to the Fifth Circuit is a "must read opinion." This case involves an application of the money laundering statute which significantly enhanced the guideline range for the defendants appearing before the Court. The Court states:

> "Implanted with the totality of the reason stated herein is a strong visceral reaction, located somewhere between the sternum and the naval, that what the government wants to do and has done to these defendants is excessive and outside the heartland; nor do some government tactics receive an acceptable grade in an examination by the olfactory senses."

D. Tax Loss.

United States v. Fabian, 1997 U.S. App. Lexis 2383 (2nd Cir. 1997) (unpublished) is a case in which the Appellate Court vacated the sentence and held that the defendant was entitled to argue that the tax loss which effects the severity of the sentence under the guidelines, was less than the government contended. The Appellate Court explained that the trial court's refusal to consider the defendant's tax loss arguments at sentencing while insisting that the tax loss arguments could only be raised at trial violated both FRCP 32(c)(1) and U.S.S.G. § 6A1.3(a).

E. Sentencing Materials.

There is very good book entitled Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues, February, 1997; published by the Federal Judicial Center. To obtain a copy forward a request by facsimile only on your firm's letterhead to the Federal Judicial Center Information Services Office at 202/273-4025. Please limit requests to single copies.

XVI. **TAX DIVISION MATERIALS**.

The Criminal Tax Manual previously published by the Tax Division of the Department of Justice is now available on floppy disk. You may obtain a copy by contacting the Department in Washington and paying a small fee.

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